Supreme Court, U.S.
FILED
99 318 JUN 14 1999
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No.

In The
SUPREME COURT of the UNITED STATES
October Term, 1998

WARREN McGLONE,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania
Eastern District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I Whether the Supreme Court of Pennsylvania erred by failing to exclude the Petitioner's statement to the police, which statement was obtained as a direct result of a warrantless arrest of the Petitioner in his home, in the absence of exigent circumstances, and in violation of the Fourth Amendment to the United States Constitution.

II Whether the Supreme Court of Pennsylvania erred by failing to exclude the Petitioner's involuntary statement to the police, which statement was obtained by force and in the face of repeated requests for the assistance of counsel during a custodial interrogation, in violation of the Fifth Amendment, Sixth Amendment, and Due Process clause of the Fourteenth Amendment to the United States Constitution.

III Whether the Supreme Court of Pennsylvania erred by failing to sever the Petitioner's trial from that of codefendant Mark Canty, where his statement as a non-testifying codefendant was offered as substantive evidence against Petitioner, thereby denying the Petitioner his Sixth Amendment right of Confrontation.

PARTIES TO THE PROCEEDING BELOW

Petitioner Warren McGlone was the Petitioner below in the Supreme Court of Pennsylvania Eastern District. Respondent Commonwealth of Pennsylvania was the Respondent below in the Supreme Court of Pennsylvania Eastern District.

There are no other parties.

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PETITION FOR A WRIT OF CERTIORARI

Warren McGlone respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania Eastern District in this case.

OPINIONS BELOW

The Per Curiam Order of the Supreme Court of Pennsylvania Eastern District, denying the Petitioner's Petition For Allowance Of Appeal, is set out in the Appendix, at 1a. The Judgment and Opinion of the Superior Court of Pennsylvania, affirming the judgment of the Court of Common Pleas of Philadelphia County and the Petitioner's conviction, are set forth in the Appendix, at 2a. The Per Curiam Order of the Superior Court of Pennsylvania, ordering the Petitioner to file a brief addressing the application of Gray v. Maryland, ___ U.S. ___, 118 S.Ct. 1151, 1998 LEXIS 1605 (1998), is set out in the Appendix, at 18a. The Opinion of the trial judge is set forth in the Appendix, at 19a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C., Section 2101(d) and 2104; and 28 U.S.C., Supreme Court Rules 10(c) and 13(1). This Petition was timely filed, i.e., within 90 days of the March 16, 1999 Order of the Supreme Court of Pennsylvania Eastern District.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend IV

"The right of the people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const. amend XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Factual Background

On January 2, 1996, three young men robbed a bank in Philadelphia, Pennsylvania, during the course of which a Philadelphia Police Officer, Lauretha Vaird, was shot and killed by one of the perpetrators.

On January 4, 1996 the Petitioner was arrested at his home as a suspect in the January 2nd bank robbery and homicide death of Police Officer Lauretha Vaird. The two detectives who arrested him had no arrest warrant; testified that he was a suspect; and handcuffed him, placed him in a police car, and drove him to police headquarters. One of the detectives also testified that the Petitioner was arrested outside of his home, but that he was given his Miranda warnings at the police station. The Petitioner testified that he had been arrested in a stairwell inside the building where he lived; that he had not been told he was a suspect; that he had been frisked and handcuffed; and that there was nothing in the detectives' behavior that communicated to him that he had the right to refuse to go with them.

At the police station the Petitioner was interrogated without benefit of counsel, with one of the detectives testifying that the Petitioner had waived his right to counsel. The Petitioner testified that he repeatedly asked for a lawyer, and that he was threatened with physical harm when he did. In response to the threats, after signing a waiver, he gave a statement. Acting on information provided in Petitioner's statement, codefendant Mark Canty was apprehended in Maryland. He subsequently gave a statement to Philadelphia police, incriminating both himself and the Petitioner.

At a joint trial of all three codefendants, including the

Petitioner, the redacted statements of the Petitioner and codefendant Mark Canty were read into the record.

During the trial, a few days before the redacted statements of the Petitioner and codefendant Mark Canty were read into the record, the Commonwealth called Lynette Medley as a witness. Ms. Medley testified that she was the wife of the Petitioner; and that she and her husband lived in an apartment with their two children. She also testified that she did not see the three defendants in her apartment on January 2, 1996; that she had been under duress and had been threatened by the police; that she was told she had to come to the police station to corroborate a statement; that the police wouldn't let her have a lawyer; that they told her that she would be arrested and held until trial as a material witness; that the police told her every answer and wrote them down; and that she didn't answer any of the questions the way they were posed.

Codefendant Mark Canty's statement was read to the jury and included information that he took part in the robbery of a PNC bank on January 2, 1996; that "other people" were with him; that he was paged at about "7:00 or 7:30" in the morning and went to an apartment complex; that the "PNC bank" was being talked about; and that he drove his car to Rising Sun and Wyoming, got into the "Caravan", and went to the bank. He is also alleged to have stated that he "drove to an apartment and Nette and the kids were there". Furthermore, he is alleged to have stated that the decision to rob the PNC bank was made on New Year's, in "Stacey's". The trial court cautioned the jury that codefendant Canty's statement was admissibleonly against him, and not against any other individual.

Right after codefendant Canty's statement was entered into the record, that of the Petitioner was read to the jury. He is alleged to have stated that he was sitting in a

green "mini van" when the shooting took place inside the bank; that "plans to rob the bank had been made at Stacey's bar a couple of days before"; and that he got the "van" at about "7:30 a.m." that morning. The trial court, as it did in regard to codefendant Canty's statement, indicated to the jury that the Petitioner's statement was admissible only against him, and not against any other person.

B. Procedure And Decisions Below

In his Motion to Suppress, a hearing on which was held just prior to the start of Petitioner's trial, Petitioner identified a number of federal question bases for the suppression of his statement to the police. Included among those bases were:

- His arrest without a valid warrant, in violation of the Fourth Amendmentprotection against illegal search and seizure;
- The denial of his request for counsel, in violation of his Fifth Amendment right to counsel;
- The continuing interrogation by police, after his request for counsel, in violation of the Fifth Amendment
- The denial of his request for counsel when adversarial proceedings had begun, in violation of his Sixth Amendment right to counsel;
- His being held incommunicado for almost twenty-two hours and being refused permission to make a telephone call until after he had been booked on charges, in violation of his Fifth Amendment right to counsel and his Fourteenth Amendment due process rights;

- His being threatened by police with physical harm in violation of his Fourteenth Amendment due process rights; and
- His being denied food and sleep by the police in violation of his Fourteenth Amendment due process rights.

The Petitioner also requested that his trial be severed from that of co-defendant Mark Canty.

After a three and a half to four day suppression hearing, that which follows constitutes the entirety of the suppression court's findings and analysis of the federal questions:

> "As to the probable cause, I do believe there was sufficient probable cause including, but not limited to the .9 millimeter weapon that had been traced to the defendant by ATF.
>
> The other information that the officers had, I am not really in a position to weigh credibility as to what information they had. They had information that they believed justified them speaking with Mr. McGlone. I accept their version. I find their testimony credible. I find that the statement was voluntarily agreed to, and I will deny the motion to suppress as to Mr. McGlone."

The court also summarily denied the Petitioner's request that his trial be severed from that of co-defendant Mark Canty.

On October 30, 1996, after a jury trial presided over by Judge Glazer, the Petitioner was convicted of murder in the second degree, three counts of robbery, conspiracy, aggravated assault, burglary and possession of instruments of

crime. On December 31, 1996, the court imposed sentences of mandatory life imprisonment on the murder conviction, and sentences of from 5 to 10 years imprisonment for each count of robbery, conspiracy, and all of which are to run consecutive to the term of life imprisonment, and consecutive to each other.

The Petitioner filed an appeal with the Superior Court of Pennsylvania and his Questions Presented For Review which included the following:

1. Did the suppression court err by failing to exclude the Petitioner's statement to the police, which statement was obtained as a direct result of an illegal arrest?
2. Did the suppression court err by failing to exclude the Petitioner's statement to the police, which statement was obtained illegally during a custodial interrogation?
3. Did the suppression court err by failing to sever the Petitioner's trial from that of codefendant Mark Canty, thereby denying the Petitioner his Sixth Amendment right of Confrontation?"

On September 8, 1998, the Superior Court of Pennsylvania affirmed the Judgment of the Court of Common Pleas of Philadelphia County. In doing so, in regard to the issues related to the arrest of the Petitioner and the voluntariness of his statement to the police, the court wrote:

> "Upon review of the record and the trial court opinion, we are confident that the suppression court's findings of fact are supported by the record and its legal conclusions are proper. . . . The manner in which appellant was apprehended by police and the circumstances of his custody and interrogation were legitimate under the facts as found by the court.

Further, the court's credibility determinations are not subject to reevaluation by this court. . . ."

In regard to the issue of denial of Petitioner's Sixth Amendment right of confrontation; and as to whether the Petitioner had raised the matter and the court had passed on it, the court wrote:

> " . . . In arguing for severance prior to trial, appellant's counsel focused primarily on the admission of Canty's statement and asserted that, despite the availability of redaction, the danger of prejudice remained. The court ultimately denied the motion to sever, as well as the motions to suppress both men's statements, and later led the parties through the redaction process. In light of counsel's pre-trial position, we decline to find waiver and instead will address appellant's claim on its merits."

The court, subsequently, after reviewing pertinent Pennsylvania and federal decisions, wrote:

> "We find the admission of Mark Canty's redacted statement proper. We also find that even if the statement should not have been admitted, the error was harmless."

In a March 16, 1999 Per Curiam Order the Supreme Court of Pennsylvania Eastern District denied the Petitioner's Petition for Allowance of Appeal.

REASONS FOR GRANTING THE PETITION

I As The Police Were Not Entitled To Arrest The Petitioner Inside Of His Home Without An Arrest Warrant, Absent Exigent Circumstances, The Statement Obtained As A Consequence Of That Arrest Resulted From A Violation Of The Fourth Amendment To The United States Constitution, And Should Have Been Excluded.

On January 4, 1996, the police did not have probable cause to arrest the Petitioner for any reason, at any place.

The suppression court concluded that "the detectives possessed sufficient probable cause to seek defendant for questioning about his involvment with this incident" because ATF information showed Petitioner's ownership of one of the guns found at the crime scene; and because of FBI information that the Petitioner "was a suspect in other unrelated armed bank robberies and assaults".

The police did not **question** the Petitioner. They **arrested** him.

It was not adequate for the suppression court to simply assert that it "was not really in a position to weigh credibility as to what information they had". The court is in the business of weighing credibility; and it was the court's responsibility to determine credibility based on what it saw and heard in the courtroom. (The court somehow weighed the credibility of the Petitioner, and found it wanting. It did not, however, explain how it was weighed or why it was wanting). There was nothing that was said by the detectives in court which warranted that their testimony be viewed with anything other than suspicion. Although the detectives had made some vague comments about the Petitioner being a "suspect in other unrelated armed robberies and assaults", no

testimony was ever offered at either the suppression hearing or the trial to support such a claim. Furthermore, contrary to what was written in the trial court Opinion, the Petitioner **never** spoke with an FBI agent or anyone else about an alleged role in any other robberies. Nor is there any **record** of the Petitioner having provided the FBI with **any** statement of any type. Finally, the Petitioner was never charged with any other bank robbery.

Even if it is assumed that there was minimum probable cause to arrest the Petitioner; it is clear that there was insufficient probable cause, combined with an abscence of exigent circumstances, of the kind necessary to justify a warrantless arrest of the Petitioner at his home.

In Dorman v. United States, 140 U.S.App.D.C. 313, 435 F.2d 385 (1970), in addressing the issue of whether an arrest warrant is required to validly arrest someone in his home unless exigent circumstances exist to justify the warrantless intrusion, the court held that the decision whether there were exigent circumstances involved consideration of the following factors:

> "First, that a grave offense is involved, particularly one that is a crime of violence. . . . Second, and obviously inter-related, that the suspect is reasonably believed to be armed. . . . Third, that there exists not merely the minimum of probable cause, that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including 'reasonably trustworthy information' to believe that the suspect committed the crime involved. Fourth, strong reason to believe that the suspect is in the premises being entered. Fifth, a likelihood that the suspect will escape if not swiftly apprehended. Sixth, the circumstances that the entry, though not consented to, is made peaceably.

In the case before this Court, it may be conceded that a crime of violence had been involved. However, as the Petitioner was returning from school with his two children, the likelihood of his being armed was virtually nonexistent. Furthermore, even if it could be argued that the police had met the more stringent probable cause requirements for a warrantless arrest, and it could not reasonably be so argued, the police knew that the Petitioner was not in the premises when they arrived. And, finally, as the police knew that the Petitoner was returning home with his children, they knew that escape would not be on his mind. Stated succinctly, there were no attendant exigent circumstances when the Petitioner was arrested at his home.

Two detectives testified that they arrested the Petitioner outside of his home. Not only is that not true, but it was also impossible under the facts as testified to by those detectives. Despite the detectives' testimony to the contrary, the Petitioner was arrested in the "residential curtilage" of his home, i.e., in a secure, locked stairway area leading to his apartment, where he had a reasonable expectation of privacy that society is prepared to accept. Dow Chemical Co. v. United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986). The Petitioner no more expected a detective to be lurking in the stairwell of a secured area than he expected an armed robber or an Action News camera man to be lurking there.

The Petitioner's spouse, Lynette Medley, testified as to the layout of the building wherein their residence was located. Additionally, the photographs submitted at trial cannot be effectively contradicted by the police simply asserting fabricated and nonsensical scenarios. In the first instance, if Detective Jastrzembski had left the hallway to intercept the Petitioner while he was on the ramp leading to the rear of the building, the door would have closed and

locked behind him because it closes and locks automatically. He could not have regained entry to the building without a key. Neither could he have "called out" to his partner who was supposed to have been at the front of the building because he would have needed either a telephone or a megaphone, given the size and configuration of the building. (However, he could have called to him if both detectives were already in the building). Detective Santiago's comings and goings from and into the building would have been just as impeded as those of his partner by the automatically-locking door. Entry may be gained at the front door by use of a key or by using the intercom and buzzer system. (That is how the detectives gained entry when they first came to the Petitioner's front door and spoke with his wife). It is undisputed that both detectives came to the front door of the Petitioner's home. It is also undisputed that Detective Santiago escorted the Petitioner's children to his apartment after he and his partner arrested the Petitioner. Furthermore, both the trial and Superior court were provided with photographs of the rear door which had a self-locking mechanism and release bar on the inside, and only a keyhole to a lock on the outside.

Both lower courts simply ignored the fact that the detectives had to be lying; and the Superior Court failed to make a logical, law-based determination that the trial court had supported its "factual" findings.

It should have been concluded that both detectives were inside the building, within the residential curtilage, when the Petitioner was arrested. Therefore, since there was no arrest warrant and no exigent circumstances, the arrest of the Petitioner was illegal. His statement, stemming from that illegal arrest should have been excluded.

II As The Police Obtained The Statement Of The Petitioner By Forcing It From him Involuntarily And In The Face Of Repeated Requests For The Assistance Of Counsel, In Violation Of His Rights Under The Fifth Amendment, Sixth Amendment, And Due Process Clause Of The Fourteenth Amendment To The United States Constitution; The Statement Should Have Been Excluded.

The Superior Court's conclusion that it found the Petitioner's "story not credible", in regard to his insistence that his statement was not made voluntarily, is incomprehensible. In regard to the illegal arrest of the Petitioner, the trial court had found the testimony of the detectives (Jastrzembski and Santiago) that they had done the **physically impossible**, when they had arrested the Petitioner in his home, to be credible without examining that testimony on the record, and without regard to unrebutted courtroom testimony that would have left Detective Jastrzembski with no credibility in the eyes of any other neutral observer. For example, the record shows that both detectives drove to a jurisdiction, where they had no authority as police officers, and picked up Mark Canty's girlfriend under the pretext of taking her to a **travel agent** to obtain a refund on money she had previously paid for an upcoming trip. In fact, they made an illegal arrest and took her to police headquarters where they forced her to make a statement about Mark Canty.

The detectives had **absolutely no credibility**.

The court's review of the record and the trial court's opinion could not have left it confident that the suppression court's findings of fact and legal conclusions were supported

by the record and proper. The findings of fact and legal conclusions **were not supported at all**. It was confirmed and/or unrebutted that:

- The Petitioner was a suspect in the crimes;
- The Petitioner was not given Miranda warning when he was arrested at his home;
- The Petitioner was handcuffed, forced into a car, and taken to police headquarters;
- The Petitioner was without legal representation when he was interrogated;
- The Petitioner was not given food during his first twenty-four hours in custody;
- The Petitioner was required to sleep on the floor of the interrogation room;
- The Petitioner was held incommunicado for twenty-two hours;
- The Petitioner was refused permission to use a telephone until after he had been booked on charges, more than twenty-two hours later;
- The Petitioner was interrogated by Federal Bureau of Investigation agents; and
- There was a twenty-four hour period between the Petitioner's arrest and his preliminary arraignment.

Finally, the Petitioner testified that he feared for his physical well being after Detective Jastrzembski told him that he had "30 cops out there waiting to come in here and beat you half to death"; after he threatened him with a "fucking lobotomy"; after being told "that we do this all the time"; and after being told by the detective that he was leaving the room and that when he came back the Petitioner was "going to tell him what the fuck he wanted to know".

Against all of the above evidence of the statement's lack of involuntariness we have the following:

- The hardly credible Detective Jastrzembski testifying that none of those things occurred; and
- A series of one word answers the Petitioner had written in response to the pro forma questions on the Miranda warnings waiver form, along with his signature.

The Commonwealth was required to show by a preponderance of the evidence that the Petitioner's statement was knowing, voluntary and intelligent. It did not come close to doing so, which is evident under the Commonwealth's own Supreme Court cases.

First of all, the Commonwealth fails under the "totality of circumstances" standard enunciated in Commonwealth v. D'Amato, 526 A.2d 300, 514 Pa. 471 (1987). Under the circumstances, particularly those involving the homicide of a Philadelphia Police Officer, the confirmed and/or unrebutted evidence points clearly to the involuntariness of the Petitioner's statement. Given the usual excitability and aggressiveness exhibited by police officers when one of their own has been physically harmed, one can easily imagine the environment in which the Petitioner found himself. In fact, the **duration** and methods of interrogation, the **conditions** of detention, and the **attitude of the police towards the accused** were certainly suspect, even without considering the Petitioner's psychological state.

Equally as significant, the situation in regard to the Miranda warnings waiver has been addressed specifically. In Commonwealth v. Bullard, 350 A.2d 797, 465 Pa. 341 (1976), the Court said:

> "The Commonwealth contends that once appellant was taken to the homicide unit interrogation room 'he

> indicated that he wanted to give a statement to the police'. The only apparent basis for this contention that appellant changed his mind once he was alone with homicide detectives is the series of one word answers appellant gave to the pro forma questions in the Miranda warnings read to him. We find this insufficient to sustain the waiver asserted by the Commonwealth. Nor are we persuaded by the testimony of detective White, an interrogating officer, that appellant indicated a willingness to talk by 'answering the questions'".

The facts surrounding the alleged waiver of the Petitioner's Miranda rights in this case are very similar to those in Bullard. Essentially, it was Detective Jastrzembski's contention that once the Petitioner was alone with him in the interrogation room, he indicated that he wanted to give a statement. The Petitioner then allegedly wrote a series of one word answers on the waiver form provided by the detective. Of course, Detective Jastrzembski testified that there had been no threats or other types of coercion; and that the Petitioner voluntarily waived his rights.

The court wasn't buying that in Bullard; and the suppression court should not have bought it in the Petitioner's case.

There is a long line of federal cases, starting with Mapp v. Ohio, 367 U.S. 643 (1961), addressing the issue of illegally obtained evidence and its exclusion from use in state criminal trials under the due process clause of the Fourteenth Amendment.

The fact that the crimes involved the death of a police officer does not justify implicit judicial approval of morally rationalized police assaults on the Fifth, Sixth and

Fourteenth Amendments to the United States Constitution.

The Petitioner's statement was not provided on the basis of a knowing and intelligent waiver of his Miranda rights. It was coerced and involuntary under any standard; and it should have been excluded.

III As The Statement Of Non-Testifying Codefendant Mark Canty Was Admitted As Substantive Evidence Against The Petitioner; Petitioner Was Denied His Right Of Confrontation In Violation Of The Sixth Amendment To The United States Constitution.

The Petitioner's trial should have been severed from that of codefendant Mark Canty. In regard to joint trials, the Supreme Court of the United States has held that where the "powerfully incriminating extrajudicial statements of a codefendant" are admitted into evidence in a joint trial with the defendant, the defendant's rights under the Confrontation Clause of the Sixth Amendment are abridged and the defendant is denied a fair trial. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). The Bruton court, however, did recognize the redaction of codefendants' statements as an alternative means of permitting the prosecuting attorney to use the confession to prove a codefendant's guilt.

Redaction has also been approved by the Supreme Court of Pennsylvania. However, the Pennsylvania cases tend to focus on the degree or extent of the violation, in combination with the other evidence against the defendant who may have been prejudiced by the non-testifying co-defendant's statement, i.e., the courts examine them on a case-by-case basis. In Commonwealth v. Johnson, 378 A.2d 859, 474 Pa. 410 (1977) the Pennsylvania Supreme Court approved the use of redaction. In Commonwealth v. Wharton, 607 A.2d 710 (1992) there were "interlocking" redacted confessions of the appellant and his codefendant, but the court reasoned that admission of the confession was harmless error because the other evidence "overwhelmingly implicated" the appellant. However, in Commonwealth v.

Ginn, No. 02530 Phila. (1991), where the statement of one of the defendants was "powerfully incriminating", despite redaction; where the method of redaction was found to have been ineffective in concealing the identity of the appellant who was a defendant in a joint trial; and where the other evidence of the appellant's guilt was not insubstantial but also was not "overwhelming", the court found the statement's admission prejudicial and granted a new trial. Finally, In Commonwealth v. Oliver, 635 A.2d 104(Pa.Super. 1993), in a case involving the joint trial of Oliver and three codefendants, two of whom had given confessions describing the crimes in great detail, the two confessions were read into evidence because the confessors refused to testify. The court held that Oliver was unfairly prejudiced by a violation of the Bruton rule and deserved a new trial. The court reasoned that redacted testimony may still violate the Bruton rule if it is "powerfully incriminating" and lends "substantial weight" to the prosecution's case. In this case (Oliver) the independent evidence is so tenuous that the court could not consider the introduction of the entire confessions to be harmless error, redactions and limiting instructions notwithstanding.

Essentially, in the Petitioner's case, the lower courts ignored its own precedents in finding that there was no reversible error in failing to sever his trial from that of codefendant Mark Canty.

On the federal side, Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968) involved two defendants tried jointly for the same crime, with the confession of one of them incriminating both himself and the other. There was a limiting instruction that the jury should consider the confession as evidence only against the confessing codefendant. In holding that, despite a limiting instruction, the introduction of such a confession at a joint

trial violates the nonconfessing defendant's Sixth Amendment right to cross-examine witnesses, the United States Supreme Court explained that:

> " . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial."

The Bruton protection extends not only to non-confessing defendants, but also to defendants who have given statements to the police. Cruz v. New York, U.S., 107 S.Ct. 1714 (1987) concerned the joint trial of two defendants, each of whom was charged with capital murder. Both defendants made inculpatory "interlocking" statements, each admitting to some role in the offense and each admitting to being an accomplice to the other. One codefendant's statement was made after the other had given his statement, and after being told that his accomplice had already admitted to their involvement. The United States Supreme court ruled that a joint trial, with admission of both statements to the police, even in redacted form, would violate the petitioner's right of Confrontation. Cruz holds that the Confrontation Clause bars admission at a joint trial of a non-testifying codefendant's confession that incriminates the defendant,

> " . . . even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him."

In the case before this Court, two of the three codefendants gave "powerfully incriminating" statements to the police relative to their participation in a January 2, 1996 bank robbery which resulted in the death of a Philadelphia police officer. Their statements were also "interlocking" in terms of their involvement in the criminal episode. Neither of the defendants who gave statements, including the Petitioner, testified at their joint trial. However, the statement of the non-testifying Mark Canty and that of the Petitioner were read into evidence with limiting instructions to the jury that the statements were to be used as evidence only against the defendant who gave the statement, and not against any other defendant.

The situation in Cruz and the situation of the Petitioner in the case before this Court are virtually identical. There, the redaction of both statements could not offset the violation of the defendant's Sixth Amendment right of confrontation. Equally as persuasive was the Court's position that the violation was no less onerous because there had been a limiting jury instruction **and** the introduction of the defendant's own statement into evidence.

Furthermore, there is a "weighty presumption" that a codefendant's statement made after arrest is "inherently unreliable" for Confrontation Clause purposes. Where the statement of the codefendant is unsworn, is untested by cross-examination, is given after the police have an admission from the first defendant and therefore "know what they are looking for", and where the second statement is attained after apprising the codefendant of the defendant's own admission, there is no basis for a finding of reliability. Lee v. Illinois, U.S., 106 S.Ct. 2056 (1986).

The situation in Lee and the one before this Court are also virtually identical. Mark Canty's statement was unsworn and untested by cross-examination; was given after

the police had a statement from the Petitioner, the first person arrested, and knew what they were looking for; and his statement was given after Canty had been advised that the Petitioner had given a statement implicating him.

In Gray v. Maryland, its most recent pronouncement on the issue, the Supreme Court of the United States made a distinction between that case and Richardson v. Marsh, 481 U.S. 200 (1987). The former case, involved redaction in the form of using the word "delete" or "deletion" in place of the petitioner's name when being read, and blank spaces followed by commas in the written version. The latter case involved the joint murder trial of Marsh and Williams, with Williams having given a confession to the police. The confession was redacted by the State to "omit all reference" to codefendant Marsh. The trial court also instructed the jury not to consider the confession against Marsh. The discussion of the victim's murder had taken place in the car. The redacted confession contained no indication that Marsh, or any other person, was in the car. However, Marsh testified at trial that she was in the back seat of the car.

The court in Richardson concluded that Williams' confession amounted to "evidence requiring linkage" in that it "became" incriminating in respect to Marsh "only when linked with evidence introduced later at trial. The court held:

> "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."

Significantly, the court added that it expressed no opinion on the admissibility of a confession in which the

defendant's name has been replaced with a symbol or neutral pronoun.

Essentially, the court held in Richardson that the statement fell outside the protection of the Bruton rule because sufficient protection is provided by a proper limiting instruction when the redaction eliminates any reference to the defendant's name.

The court in Gray v. Maryland said that unlike the statement in Richardson, the confession of Bell refers directly to the "existence" of the nonconfessing defendant by replacing his name with the word "deleted" or a blank space set off by commas. The Court held that an obvious indication of deletion, such as a blank space, use of the word "deleted", or a similar symbol fell within the protection of the Bruton rule. The court reasoned that a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant. Additionally, the obvious deletion may well call the jurors' attention specifically to the removed name. Finally, Bruton's protected statements and statements redacted to leave a blank or some other similarly obvious alteration, function the same way grammatically. They are directly accusatory.

The Gray v. Maryland court went on to say that Richardson's inferences involved statements that did not refer directly to the defendant himself and which became incriminating "only when linked with evidence introduced later at trial."

> "The inferences at issue here involve statements that, despite redaction, obviously refer to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even if the confession were the very first item produced at trial."

It is worth noting that in United States v. Garcia, 836 F.2d 385 (CA8 1987) and Clark v. Maggio, 737 F.2d 471 (CA5 1984), cited by the court, there may have been Bruton rule violations in both cases. In Garcia the codefendant's name was replaced with the neutral pronoun "someone", but there was "overwhelming evidence" against the complaining codefendant. The court concluded, therefore, that even if admission of the statement had been an error, it would have been harmless. In Maggio the court found that the totality of the testimony constituted a violation of the Bruton rule. However, it concluded that none of the information supplied by the codefendant's statements was crucial to the prosecution's case. Thus, the admission of the statement evidence did not constitute plain error and therefore did not warrant reversal.

In the case before this Court the Commonwealth did not eliminate all reference to the Petitioner. The use of "someone", although left open in the federal case decisions as to the issue of Bruton rule violation not only referred to the Petitioner's existence, but also specifically pointed at him. At trial, a few days before the redacted statement of Mark Canty was read into evidence, the Commonwealth called Lynette Medley as a witness. She testified that she was the wife of the Petitioner and that she and her husband lived in an apartment with their two children. When Canty's statement was read into evidence a few days later, it included a reference to his having driven to an "apartment and Nette and the kids were there." Under the caselaw this would appear to be a situation where the jury would make a permissible "inference", thereby identifying the Petitioner. However, under the specific facts here, the nature of the words made it so clear that it was the Petitioner who was one of the subjects of Canty's statement, that it was the equivalent of a "direct reference". The trial judge's caution

that Mr. Canty's statement was admissible only against him, and not against any other individual, was useless.

Additionally, Canty's statement "interlocks" with that of Petitioner's in regard to date, time of the criminal activity, the PNC bank, the Caravan/mini van, the Rising Sun Avenue location, and the Stacey's bar meeting. The "interlocking" statements had to have had a devastating impact on the jury's determination of Petitioner's guilt.

Admitting the statement was not "harmless error". It was "plain error". Contrary to the opinions of the trial and appellate courts, the evidence against the Petitioner was "virtually nonexistent". It consisted of a crime scene handgun which had been purchased by someone other than Petitioner; and an identification by a truck driver some distance from the crime scene. No one saw the Petitioner at the scene. Therefore, Canty's statement lent "substantial weight" to the prosecution's case.

Finally, the terms "other people" and "someone" are no less "directly accusatory" than "delete" or "deletion" or a blank space when combined with the fact that Canty's statement specifically mentions "Nette and the kids". The distinction between the disallowed "reference" and the permitted "inference" is fairly clear. However, in some cases, as in the one before this Court, an "inference" may be so easily or readily made that it constitutes a "reference" for all practical purposes. Here, where the Petitioner was tried for murder as a consequence of a statement that was either coerced or given voluntarily, he sat before a jury who knew exactly about whom co-defendant Canty was talking.

Gray should be viewed as another attempt by this Court to wrestle with the concept of "redaction" and all its imperfections. It simply stands for the proposition that a specific type of redaction is unacceptable for Confrontation Clause purposes. However, it should be read as an

indication that this Court is moving away from redaction as an acceptable alternative in joint trials where the statement of a non-testifying codefendant is offered as substantive evidence against another defendant. At the very least, this Court should take this opportunity to eliminate the use of terms such as "someone", "others", "someone else", "other people", and the like. The use of such words does little to steer juries away from prejudice. In fact, such use invites it.

The Petitioner was denied his Sixth Amendment right of Confrontation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 513 E.D. Allocatur Docket 1998
Respondent	:	Petition for Allowance of Appeal from the Superior
v.	:	Court
WARREN MCGLONE,	:	
Petitioner	:	

ORDER

PER CURIAM:

AND NOW, this 16th day of March, 1999, the Petition for Allowance of Appeal is hereby DENIED.

TRUE COPY FROM RECORD

Attest: MAR 13, 1999

/s/ John W. Person, Jr.
John W. Person, Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

J. A13034/98

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
WARREN McGLONE,	:	
Appellant	:	No. 546 Philadelphia 1997

Appeal from the Judgment Entered December 31, 1996, In the Court of Common Pleas of Philadelphia County, Criminal No. 9602 866 2/3

BEFORE: TAMILIA, ORIE MELVIN and BECK, JJ.

OPINION BY BECK, J.:

FILED SEP - 8 1998

In this appeal from the judgment of sentence for second degree murder and related offenses, we consider, **inter alia**, whether and to what extent the statement of a non-testifying co-defendant may be redacted to allow its admission at a joint trial. After careful consideration of **Gray v. Maryland,** ___ U.S. ___, S.Ct. 1151, 1998 LEXIS 1605 (1998), we affirm.

On the morning of January 2, 1996, Philadelphia Police Officer Lauretha Vaird responded to a radio call of a bank robbery in progress. Upon entering the bank, Officer Vaird interrupted the crime and was shot in the abdomen by

one of the robbers. She later died of her wounds.

Three men planned and executed the fatal robbery. Mark Canty and Christopher Roney entered the bank armed with guns while appellant Warren McGlone waited for them in the getaway vehicle, a stolen mini-van. After shooting Officer Vaird and attempting to shoot another officer, Roney jumped into the van and appellant sped away. Canty fled on foot. Both men dropped their weapons before fleeing.

By tracing ownership records of the guns found at the scene, police identified appellant as a suspect. They approached appellant outside his home and he agreed to accompany them to headquarters where he later made a full confession. Appellant's wife told police that appellant met with Canty and Roney shortly after the incident, at which time the men watched televised reports of the robbery/murder and discussed their escape.

Other evidence presented at trial established that one of the guns used in the crime was purchased by a woman for appellant. In addition, a citizen who observed the van fleeing from the bank identified appellant as the driver.

On appeal appellant raises three issues. The first two involve the admission of his own statement. He claims that the confession was "the direct result of an illegal arrest" and/or "obtained illegally during custodial interrogation."

Appellant relies primarily on allegations of police misconduct to support his claims. He argues that he was arrested in his home without a warrant, that he was not given **Miranda**[1] warnings, that he requested but was refused an attorney, that he was deceived by police and that he was threatened with physical harm. Prior to trial, the

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[1] **Miranda v. Arizona**, 384 U.S. 436 (1966).

suppression court heard all of these allegations, as well as the version of events presented by the police. The court found appellant's story not credible. Specifically, the court found that appellant was arrested outside his home, that he was informed of his **Miranda** rights, that no police deception occurred and that appellant's statement to police was voluntarily given.

In addition, the court found that the police had probable cause to question and detain appellant due to the connection between him and one of the guns found at the scene and information from federal authorities that appellant was a suspect in other armed bank robberies. Finally, the court found no violation of the "six hour rule" which our supreme court set forth in **Commonwealth v. Davenport**, 471 Pa. 278, 370 A.2d 301 (1977) and further refined in **Commonwealth v. Duncan**, 514 Pa. 395, 525 A.2d 1177 (1987).[2]

Upon review of the record and the trial court opinion, we are confident that the suppression court's findings of fact are supported by the record and its legal conclusions are proper. **Commonwealth v. Lopez**, 609 A.2d 177, 178 (Pa.Super.), **appeal denied**, 533 Pa. 598, 617 A.2d 1273 (1992). The manner in which appellant was apprehended by police and the circumstances of his custody and interrogation were legitimate under the facts as found by the court. Further, the court's credibility determinations are not subject

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2 Because his preliminary arraignment did not take place within six hours of his arrest, appellant claimed a violation of **Davenport** and sought suppression on that basis. However, since his statement was given prior to the six hour period, the court properly rejected the request. **Duncan**, 514 Pa. at __, 525 A.2d at 1183.

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to reevaluation by this court. **Commonwealth v. Fitzpatrick**, 666 A.2d 323, 325 (Pa.Super. 1995). In sum, we find no error by the trial court in denying appellant's motion to suppress his statement to police.

Appellant's third claim concerns the admission of his co-defendant's statement. Appellant asserts that the prosecution's use of Mark Canty's statement at trial denied him his sixth amendment right to confront witnesses against him. He insists that this could have been remedied only by severing his case from Canty's, a request that he made prior to trial, but which the court rejected.

In a pre-trial motion to sever his case from his co-defendant's case, appellant argued that admission of Canty's statement was prejudicial. The court denied the motion to sever and the parties then set about redacting the statement to avoid prejudice to appellant. The trial court recounts in its opinion:

> Prior to the admission of both the statements made by co-defendant Canty and [appellant], this Court conducted two separate hearings . . . to determine the best method to redact these statements. The parties eventually reached an agreement as to the final redacted version of both statements, where portions of each statement inculpating either co-defendant were omitted and specific names substituted with 'other persons' or 'person' when necessary to preserve the integrity of each statement. . . . The final versions of each statement only implicated the confessor of the statement and mentioned the confessor's role in the criminal acts. . . .

Trial Ct. Op. at 12 -13.

The Commonwealth argues that because appellant did

did not renew his motion to sever after his statement was redacted or when the statement was admitted, he has waived his claim. This is technically correct. **Commonwealth v. Johnson**, 534 A.2d 511, 515 (Pa.Super. 1987), **appeal denied**, 520 Pa. 587, 551 A.2d 214 (1988). However, in arguing for severance prior to trial, appellant's counsel focused primarily on the admission of Canty's statement and asserted that, despite the availability of redaction, the danger of prejudice remained. The court ultimately denied the motion to sever, as well as the motions to suppress both men's statements, and later led the parties through the redaction process. In light of counsel's pre-trial position, we decline to find waiver and instead will address appellant's claim on its merits.

Our task then is to determine whether the admission of Canty's redacted statement violated appellant's constitutional rights.

The primary basis for such a claim was first recognized by the United States Supreme Court in **Bruton v. United States**, 391 U.S. 123 (1968). In **Bruton**, two co-defendants were tried jointly and neither testified on his own behalf. The statement of one, implicating himself and his co-defendant, was presented to the jury. In the statement, the co-defendant specifically named Bruton. Although the trial court instructed the jury to consider the statement only against the defendant who made it, the Supreme Court held that admission of the statement violated Bruton's constitutional rights. This was so, reasoned the Court, because the co-defendant did not testify at trial and, therefore, his allegations against Bruton were not subject to cross-examination. Admission of the statement constituted a violation of Bruton's sixth amendment right to confront

witnesses against him. **Id.**

Nearly twenty years later, the Supreme Court revisited the "**Bruton** rule" in **Richardson v. Marsh**, 481 U.S. 200 (1987). There, in a joint trial, the confession of a non-testifying co-defendant was redacted. The issue was whether the redacted confession was sufficient to protect the sixth amendment rights of the other co-defendant, Clarissa Marsh. The statement was redacted "so as to 'omit all reference' to [Marsh] . . . indeed, to omit all indication that anyone other than . . . [the co-defendant] and a third person had 'participated in the crime'". **Id.** at 203. The **Richardson** court recognized that although the statement did not on its face incriminate Marsh, the substance of the confession became incriminating to her when linked with evidence introduced later at trial. Despite this, the Supreme Court found no violation of the **Bruton** rule. The Court held:

> [T]he Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

Id. at 211.

Richardson explicitly left open the issue of whether confrontation clause interests are protected when, in a redacted statement, a co-defendant's name is replaced with a symbol or a neutral pronoun. However, in the wake of **Bruton** and **Richardson**, this court routinely approved the use of statements redacted in this manner as long as the statement was no "powerfully incriminating" or lent "substantial, perhaps critical, weight" to the prosecution's case. **See Commonwealth v. Rawls**, 419 A.2d 109, 113

(Pa.Super. 1980) (where redacted statement on its face does not incriminate defendant, admission proper), **appeal dismissed**, 499 Pa. 267, 452 A.2d 1347 (1982). **See Also Commonwealth v. Miles**, 545 Pa. 500, 681 A.2d 1295 (1996) (use of term "X" in place of defendant's name permissible in light of limiting instruction); **Commonwealth v. Presbury**, 665 A.2d 825 (Pa.Super. 1995) ("other guy" reference in redacted confession did not render confession inadmissible), **appeal denied**, 544 Pa. 627, 675 A.2d 1246 (1996); **Commonwealth v. Pirela**, 580 A.2d 848 (Pa.Super. 1990) (use of "X" proper particularly since trial judge was fact finder), **appeal denied**, 527 Pa. 672, 594 A.2d 658 (1991); **Commonwealth v. Hess**, 548 A.2d 582 (Pa.Super. 1988) (replacement of defendant's name with term "other person" acceptable), **appeal denied**, 522 Pa. 618, 563 A.2d 887 (1989).

With respect to the extent of the redaction in light of other evidence presented at trial, the rule in the commonwealth was clear: "contextual inculpation" did not render a redacted statement inadmissible, that is, where the redacted statement became incriminating only when considered in light of other evidence presented at trial, its admission was not barred. **Presbury, supra**.

In further refining the rule, our supreme court held that a harmless error analysis is proper when considering a **Bruton** claim. Therefore, even if a redacted confession could be deemed a **Bruton** violation, its admission may be harmless if other evidence, particularly a confession by the defendant himself, overwhelmingly establishes the defendant's guilt. **See Commonwealth v. Wharton**, 530 Pa. 127, 607 A.2d 710 (1992) (admission of redacted confession that used term "other guy", even if **Bruton** violation, was harmless error

since defendant's own interlocking confession properly admitted). **See also Miles, supra** (assuming **Bruton** violation, overwhelming evidence of guilt, including confession by defendant, made error harmless).

On the day before appellant's case was argued before this court, the United States Supreme Court again confronted the **Bruton** issue. In **Gray v. Maryland**, ___ U.S. ___, 118 S.Ct. 1151, 1998 U.S. LEXIS 1605 (1998), the Court was faced with a redacted confession that the petitioner claimed violated his sixth amendment rights.

Kevin Gray, standing trial with two co-defendants in the beating death of another man, argued that the admission of one of the co-defendant's confession was precluded under **Bruton** as well as **Richardson**. This was so, Gray argued, because the manner of redaction was insufficient to protect his constitutional rights. The court summarized the error as follows:

> The trial judge, after denying Gray's motion for a separate trial, permitted the State to introduce [co-defendant] Bell's confession into evidence at trial. But the judge ordered the confession redacted. Consequently, the police detective who read the confession into evidence said the word "deleted" or "deletion" whenever Gray's name . . . [or that of his other co-defendant] appeared. Immediately after the police detective read the redacted confession to the jury, the prosecutor asked, "after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" The officer responded "That's correct." The State also introduced into evidence a written copy of the confession with those two names omitted, leaving in

their places blank white spaces separated by commas. **Id.** at ___, 1998 LEXIS 1605 * 7 - 8 (citations omitted).

The **Gray** court acknowledged that the case before it did not present a pure **Bruton** issue in that the confession did not refer to Gray by name. Nor was the case exactly like **Richardson** wherein the redacted statement omitted all reference to the defendant. Highlighting the differences between **Bruton** and **Richardson**, the Court observed:

> The [**Richardson**] Court distinguished [the] confession in **Bruton** as a confession that was "incriminating on its face", and which had "expressly implicated" Bruton. By contrast, . . . [the confession in **Richardson**] amounted to "evidence requiring linkage" in that it "became incriminating in respect to . . . [the fedendant] only when linked with evidence introduced later at trial."

Id. at ___, 1998 LEXIS 1605 * 12 (citations omitted).

The **Gray** Court conceded that the confession before it was not facially incriminating and instead required the jury to infer a connection between the term "deleted" and the defendant. Still, the Court reasoned, the mere necessity of an inference, however slight, did not automatically take the statement outside **Bruton's** scope and place it within **Richardson's.**

> [I]nference pure and simple cannot make the critical difference. . . . **Richardson** must depend in significant part upon the kind of, not the simple fact of, inference. **Richardson's** inferences involved statements that did not refer directly to the defendant himself and which became incriminating "only when linked with evidence introduced later at trial." The inferences at issue here involved statements that,

> despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.

Id. at ___, 1998 LEXIS 1605 * 18 - 19 (citations omitted).

In attempting to show how the statement in **Gray** could have been redacted in a proper manner, the Court stated:

> Consider as an example a portion of the confession before us: The witness who read the confession told the jury that the confession (among other things) said,
>
> > Question: Who was in the group that beat Stacey?
> >
> > Answer: Me, deleted, deleted, and a few other guys.
>
> Why could the witness not, instead, have said:
>
> > Question: Who was in the group that beat Stacey?
> >
> > Answer: Me and a few other guys.

Id. at ___, 1998 LEXIS 1605 * 21.

Appellant does not argue that Mark Canty's redacted statement included blanks, symbols or the term "delete". Nonetheless, appellant characterizes Canty's confession as "powerfully incriminating," "devastating" and lending "substantial weight to the prosecution's case." In addition, he argues that the error in admitting the redacted confession was not harmless since the evidence against him was far from overwhelming and was, instead, "virtually nonexistent." **Appellant's Supplemental Brief** at 17.

The Commonwealth insists that the redaction method was so complete that no indications of redaction were present and the standard set forth in **Gray** was satisfied..

We have reviewed the original and redacted

statements carefully. Nowhere in the redacted statement are there overt indications of revision. When read in its redacted form, it is not obvious, or even noticeable, that parts of the statement were deleted or replaced. With respect to Roney and the appellant, most, if not all, of their participation was omitted completely from the statement. The statement focuses primarily on Canty's criminal acrs.

While there are very few references to other participants, the redacted statement clearly establishes that Canty did not act alone. At one point Canty is asked: Who were you with? His redacted reply was "Other people." At another point Canty explains that he went to an apartment after the crime and "Nette and the kids were there."

Appellant insists that these excerpts were were prejudicial. he argues that the use of the term "other people" is "no less attention-drawing than the word delete or the use of blanks." **Appellant's Supplemental Brief** at 17. He claims that this reference and the one to Nette and the kids "pointed directly at him" since Nette is his wife.[3] Finally, he asserts that because his own statement "interlocked" with Canty's statement as to the date, time, location and other details of the crime, the admission of Canty's statement was "powerfully incriminating and devastating." **Id.**

We find Canty's statement, despite being redacted before the decision in **Gray** was announced, nonetheless complied with **Gray's** requirements and therefore its admission did not violate appellant's constitutional rights. Unlike in **Gray**, Canty's redacted statement did not reveal to the jury a specific name or the fact that one was omitted.[4]

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[3] The jury was made aware of this fact because appellant's wife was called as a witness by the Commonwealth.

[4] In the original version of the statement, Canty identified his two codefendants by name and also identified their photographs.

There was no mysterious Mr. "X" or gaping holes in the narrative read by the detective on the stand. The simple reference to "other people" did not directly incriminate appellant; indeed, the deletion of appellant's name and use of the term "other people", as opposed to a blank space or the term "deleted", is precisely what the **Gray** Court suggested the prosecution should have used in that case.[5] Further, the record reflects that one of the prosecutors specifically cautioned the other attorneys to refrain from displaying the marked-up statements to the jury, to insure that the jurors would not learn that the statements had been altered.

We interpret **Gray** as precluding the prosecution from offering a statement where the redaction itself is obvious to the jury, thereby drawing attention to the co-defendant. Use of the term "deleted" or "X" immediately signals jurors that a specific person was named by the declarant and they, the jurors, are not permitted to know that name. Coupled with the court's instruction that the jury refrain from using the statement against the co-defendant, the redacted statement becomes "powerfully incriminating, placing it within **Bruton's** protection. **See Gray, supra** at ___, 1998 LEXIS * 20 (redacted confession "with blank prominent on its face" incriminates the co-defendant).

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5 Canty's statement was extensively redacted. In the beginning of the statement, Canty told police that appellant's nickname was "Boob." Thereafter, Canty repeatedly referred to Boob and Roney, telling police about their parts in the crime. However, the redacted statement omitted all references to the other men. When Canty was asked where he went the morning of the robbery, he replied: "Boob's house. An apartment complex on Conshohocken Ave. Chris and Boob were both there." When asked what he did when he arrived at the bank, Canty explained: "Yes. Boob was driving. When we got there, he like drove around to see if any people was there. He let us out like right across the street and told us to go down to the corner and wait like we was waiting for the bus." The redacted statement reads: Yes. I

not have the same forceful impact. Not only does the term eliminate the name of the defendant, it also eliminates the fact that an alteration has been made. The powerfully incriminating nature of an obvious and glaring "hole" in the statement simply is not present when a generic term like "other man" is used.[6]

With respect to the reference to appellant's wife, we observe that the **Gray** Court, while refining **Bruton** and **Richardson**, did not abandon the notion of inference or contextual inculpation. Instead, the Court reaffirmed **Richardson's** approval of statements that do not "refer directly to the defendant himself and which become incriminating only when linked with evidence introduced later at trial." **Id.**, at ___, 1998 LEXIS 1605 * 19 - 20. What is prohibited are inferences involving statements that "despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced ar trial." **Id.** (emphasis supplied).

Appellant argues that the non-testifying co-defendant's statement is inadmissible under **Gray** because the

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got out right across the street and got down to the corner and waited like I was waiting for the bus."

Nearly an entire page of Canty's statement, wherein he explains that appellant gave him a utility company uniform to wear, insisted that he wear gloves and supplied him with a gun, was completely omitted from the redacted version. Also omitted from Canty's statement was appellant's description of the shooting and his warning to the others to refrain from telling anyone else about the incident.

6 It is reasonable to believe that the statement's maker told police that he and "another guy" committed the crime. In **Gray**, the declarant in fact used the term "other guys". The Court questioned why the prosecutor did not simply excise Gray's name altogether, leaving only the generic term.

statement, coupled with other evidence properly admitted at trial, gives rise to the inference that appellant participated in the crime. We disagree. **Gray** addresses the situation where a redacted statement of the co-defendant itself gives rise to the immediate inference that appellant was a participant. Appellant urges us to read **Gray** expansively, which we decline to do. The sixth amendment right of confrontation does not require the scope of protection that appellant seeks.

We are convinced that the inferences required in this case do not rise to the level of those prohibited in **Gray**. We are also certain that Canty's statement was neither "powerfully incriminating" nor "devastating" to appellant's case.[7]

For those same reasons, appellant is not entitled to relief simply because his own confession and Canty's are interlocking, i.e., similar in their account of events. The existence of independent evidence "requiring linkage" is not a valid basis for precluding a statement's admission.[8] **See Gray, supra**. Lastly, we find that appellant's claim that Canty's statement was "devastating" to his case is not to be supported by the record. We observe that admission of the statement remains subject to a harmless error analysis. **Wharton, supra; Cruz v. New York**, 481 U.S. 186 (1987). The evidence established that appellant was identified as the driver of the getaway car. Further, a gun found at the scene was purchased for him by another at his request. His wife told police about his presence in their home shortly after the

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7 The **Gray** Court clearly was troubled by "statements redacted to leave a blank or some other similarly obvious alteration" which the Court labeled "directly accusatory." **Id.** at ___, 1998 LEXIS 1605 * 16.

8 The mention of Nette in Canty' statement, from which the jury could infer that appellant was a participant when Nette later testified, and the interlocking nature of Canty's statement, from which the jury could also infer that appellant was a participant, did not make Canty's statement inadmissible

robbery/murder and the jury heard about the highly incriminating conversations he had with his cohorts on that day. In addition to all of that evidence, appellant made a complete confession to police which was properly admitted at trial. Contrary to appellant's claims, the evidence against him is far from "nonexistent"; it is overwhelming.

We find the admission of Mark Canty's redacted statement proper. We also find that even if the statement should not have been admitted, the error was harmless.

Judgment of sentence affirmed.

Judge Tamillia concurs in the result.

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under **Gray**. There is no violation of **Gray** where the non-testifying co-defendant's statement incriminates the defendannt only by inference from other evidence.

J. A13034/98

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
WARREN McGLONE,	:	
Appellant	:	No. 546 Philadelphia 1997

ORDER

Appellant, Warren McGlone, is hereby ORDERED, within twenty (20) days of the date of this order, to file a brief addressing the application of Gray v. Maryland, 1998 Lexis 1605 (decided March 9, 1998) in this case. Appellee, the Commonwealth, is hereby ORDERED to file a responsive brief addressing the same issue within twenty (20) days of the date Appellant's brief is filed.

PER CURIAM

FILED: MARCH 25, 1998

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	: FEBRUARY TERM, 1996
v.	:
WARREN McGLONE	: NO. 0866 2/3

OPINION

GLAZER, J.

PROCEDURAL HISTORY

On October 30, 1996, following a jury trial, defendant Warren McGlone was found guilty of Murder in the Second Degree, three counts of Robbery (F-1), Conspiracy, Aggravated Assault (F-1), Burglary, and Possession of an Instrument of Crime ("PIC"). On December 31, 1996, this Court imposed the mandatory sentence of life imprisonment for the Murder in the Second Degree conviction pursuant to 18 Pa.C.S. § 1102(b) and consecutive sentences of 5 to 10 years state imprisonment for each count of Robbery, for the Conspiracy conviction, and for the Aggravated Assault conviction.[1] This appeal followed.

[1]For defendant's Burglary and PIC convictions, no further penalty was imposed. Therefore, this Court sentenced defendant to a total sentence of 25 to 50 years state imprisonment consecutive to a term of life imprisonment.

FACTUAL HISTORY

On January 2, 1996, at approximately 8:20 a.m., Mark Canty and Christopher Roney forced Norma Winn, Loretta Johnson and Ann Vicola at gunpoint into the PNC bank located at 4710 Rising Sun Avenue, where all three women worked (N.T. 10/17/96, pp. 43-48, 65-71; N.T. 10/21/96, pp. 36-42, 50-118, 127-133, 172-180, 187-189, 195-208; N.T. 10/22/96, Jury Trial, pp. 3-14, 17, 47-54).[2] Inside the bank, co-defendants Roney and Canty ordered Ms. Vicola and Ms. Winn to open the bank vault (N.T. 10/21/96, pp. 119-120, 133-134, 177-181, 208-211; N.T. 10/22/96, Jury Trial, pp. 14-15, 55). At the bank vault, Canty shouted to Roney, who was guarding Ms. Johnson at the front of the bank, "Here comes the heat" (N.T. 10/21/96, pp. 120-121, 181, 225-226; N.T. 10/22/96, Jury Trial, pp. 15-16). Roney responded, "Don't worry, I'll take care of them." (N.T. 10/21/96, pp. 120-122). Roney, then, fatally shot Police Officer Lauretha Vaird, the first police officer to respond to a report of an attempted robbery at the bank, inside the bank during his escape attempt (N.T. 10/16/96, pp. 125-127, 179-180; N.T. 10/17/96, pp. 10-11; N.T. 10/18/96, pp. 29-33, 36-39, 50-62; N.T. 10/21/96, pp. 122, 157-158, 181-183; N.T. 10/22/96, Jury Trial, pp. 16-18; N.T. 10/24/96, pp. 13-31). Meanwhile, Canty had fled from the bank through a side entrance, leaving his gun behind (N.T. 10/21/96, pp. 122, 165-169, 181-183, 234-241).

Outside the bank as co-defendant Roney ran towards a green minivan, Roney exchanged gunfire with Police Officer Donald Patterson, who arrived on the scene shortly after Officer Vaird (N.T. 10/16/96, pp. 126-128; N.T. 10/18/96,

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2Defendant Warren McGlone, Mark Canty and Christopher Roney were tried together as co-defendants.

pp. 31-34, 48-49, 62-93). Co-defendant Roney, then, jumped into the waiting green minivan driven by defendant Warren McGlone and drove away on Rising Sun Avenue (N.T. 10/18/96, pp. 34-36). Defendant and his co-defendant rendezvoused at defendant's home to recount the events at the PNC Bank before disbanding (N.T. 10/18/96, pp. 167-202, 207-244).

The police later found the green minivan abandoned at 4500 North 11th Street, various items of clothing worn as disguises by co-defendants Roney and Canty, a loaded .9 millimeter automatic gun, which was lying on the sidewalk in front of the side entrance of the bank, and a loaded .380 caliber Lorcin revolver on the sidewalk near the bank (N.T. 10/15/96, pp. 109-210; N.T. 10/16/96, pp. 24-97, 204-209; N.T. 10/21/96, pp. 37-38, 135-137, 177-179, 242-243; N.T. 10/22/96, Jury Trial, pp. 10-11). The Bureau of Alcohol, Tobacco, and Firearms ("ATF") traced the .380 caliber Lorcin to Anthony Brown, a relative of co-defendant Canty, who testified that his gun was stolen and last seen in the possession of co-defendant Canty (N.T. 10/17/96, pp. 99-107; N.T. 10/17/96, Afternoon Session, 28-34, 88-90). The ATF also traced the .9 millimeter automatic gun to Richelle Parker, a friend of defendant, who stated that she purchased the gun for defendant (N.T. 10/17/96, Afternoon session, pp. 36-46, 89-92). Defendant and co-defendant Canty subsequently confessed to their participation in the attempted robbery (N.T. 10/23/96, Jury Trial, pp. 39-60, 101-164).

DISCUSSION

1. Defendant claims that this Court erred when it failed to suppress his statement to the police because the police

illegally obtained his confession.

When reviewing a ruling on a suppression motion, the factual findings and legal conclusions drawn therefrom must be supported by the evidence. Commonwealth v. Bronshtein, No. 88 Capital Appeal Docket, 1997 Pa. LEXIS 590, * 10 (pa. March 25, 1997). The suppression court possesses the exclusive province to determine credibility of the witnesses and the weight to be accorded to the evidence. Commonwealth v. Fitzpatrick, 446 Pa.Super. 87, 91, 666 A.2d 323, 325 (Pa.Super. Ct. 1995).

a. Defendant claims that the police arrested him without a valid arrest warrant, in the absence of exigent circumstances and without probable cause to arrest, which triggered his allegedly invalid confession.

In order to effectuate a warrantless arrest, there must be probable cause. Commonwealth v. Romero, 449 Pa.Super. 194, 198, 673 A.2d 374, 376 (pa.Super. Ct. 1996). Probable cause for a warrantless arrest exists if the facts and circumstances known by the police officer at the time of the arrest are sufficient to justify a person of reasonable caution to believe the suspect has committed or is committing a crime. Commonwealth v. Rosario-Hernandez, 446 Pa.Super. 24, 31, 666 A.2d 292, 295 (Pa.Super. Ct. 1995). Probable cause only requires the probability of criminal activity and not the certainty of such activity. Romero, 673 A.2d at 376.

In the instant case, on January 4, 1996, Detectives Frank Jastrzembski and Manny Santiago went to defendant's home to question him about the shooting death of Police Officer Vaird during the attempted robbery at the PNC Bank and, consequently, did not possess an arrest warrant (N.T.

10/1/96, pp. 77-79). However, as this Court found, the detectives possessed sufficient probable cause to seek defendant for questioning about his involvement with this incident, based upon ATF information that defendant owned one of the guns found at the crime scene and that defendant was a suspect in other unrelated armed bank and supermarket robberies and assaults (N.T. 10/1/96, pp. 73-78; N.T. 10/4/96, pp. 76-79).

b. Defendant claims that his arrest at his house disregarded his Fifth Amendment rights against self-incrimination by engaging in a deception designed to circumvent the Miranda warnings, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, L.Ed.2d 694 (1966).

As stated previously, this Court found that there was sufficient probable cause to support seeking the defendant for questioning. Furthermore, the detectives stopped defendant outside his house, told defendant that he was a suspect in the shooting death of Officer Vaird and asked defendant to accompany them to the police station for questioning (N.T. 10/1/96, pp. 79-80). After defendant agreed to accompany the detectives, the detective handcuffed and drove defendant to the police station, where he was apprised of his Miranda rights before any questioning began (N.T. 10/1/96, pp. 73-74, 79-81, 86-87). The homicide detectives never attempted to elicit any further information from defendant and only began to question defendant after defendant was apprised of his Miranda rights. Therefore, there was no deception rising to the level of a constitutional violation.

c. Defendant alleges that the police violated his Fifth and Sixth Amendment rights to counsel by failing to advise him of his Miranda rights by denying his request to speak with an attorney and by continuing to interrogate him after he requested to speak with an attorney.

A confession obtained during a custodial interrogation is admissible if the accused's Miranda rights, including the right to remain silent and to counsel have been explained, the accused manifested an understanding of these rights, and the accused subsequently voluntarily and intelligently waived those rights. Commonwealth v. Jones, __ Pa. __, 683 A.2d 1181, 1189 (1996); Bronshtein, 1997 Pa. LEXIS 590, at * 11. A totality of the circumstances test is utilized to determine if a confession was voluntary and the Miranda rights validly waived. Jones, 683 A.2d at 1189; Commonwealth v. Carter, 377 Pa.Super. 93, 102, 546 A.2d 1173, 1177 (Pa.Super.Ct. 1988), allocatur denied, 523 Pa. 630, 564 A.2d 1259 (1989). The factors considered for this determination are: (1) the duration and methods of interrogation; (2) the conditions of detention; (3) the attitude of the police towards the accused; (4) the accused's physical and psychological state; and (5) any other conditions which would render a person unable to resist powers of suggestion or coercion. Jones, 683 A.2d at 1189; Carter, 546 A.2d at 1177.

At the suppression hearing the police officers testified that, although they did not give defendant Miranda warnings after they handcuffed the defendant, the police did give him these warnings, including apprising defendant of his right to an attorney and to remain silent, shortly after arriving at the police station and before any questioning of defendant began (N.T. 10/1/96, pp. 52-59, 79-81). Detective Frank

Jastrzembski, who conducted the questioning of defendant, credibly testified that he informed defendant of his Miranda rights and questioned defendant about defendant's willingness to waive these rights (N.T. 10/1/96, pp. 55-59). Defendant, then, responded to each question of Detective Jastrzembski in writing, initialed each of his responses and signed the bottom of the page containing these questions (N.T. 10/1/96, pp. 57-60, 107-116). Afterwards, Detective Jastrzembski began questioning defendant and recorded both the questions and defendant's answers vervatim (N.T. 10/1/96, pp. 60-73). Defendant initialed and signed each page of his police statement (N.T. 10/1/96, pp. 73, 113-115).

Despite the testimony of defendant and defense witnesses at the suppression hearing to the contrary, this Court explicitly found that the testimony of Detective Jastrzembski was more credible regarding the facts and circumstances surrounding defendant's custodial interrogation and that defendant voluntarily waived his Miranda rights as read by Detective Jastrzembski (N.T. 10/1/96, pp. 90-128; N.T. 10/4/96, pp. 76-78). First, the Philadelphia police officers began questioning defendant at approximately 3:50 p.m. and concluded the interrogation at 7:40 p.m. without further contact with defendant (N.T. 10/1/96, pp. 73, 80-82). Secondly, Detective Jastrzembski stated that none of the police officers at defendant's questioning threatened, coerced, struck, or promised defendant anything in order to elicit incriminating statements from defendant (N.T. 10/196, pp. 57- 73, 81). See Bronshtein, 1997 Pa. LEXIS 590, at * 11. Third, Detective Jastrzembski further testified that defendant appeared calm, relaxed and confident (N.T. 10/1/96, p. 57). Finally, Detective Jastrzembski also asked defendant if defendant wanted anything to eat or drink and honored defendant's request for a soda on at least two separate occasions (N.T. 10/1/96, p. 82). Based on the totality of

circumstances, the record supports this Court's determination that defendant voluntarily and knowingly waived his Miranda rights before speaking to the police. Therefore, this Court appropriately denied defendant's motion to suppress his statement.

d. Defendant also claims that he was denied a preliminary arraignment without unnecessary delay.

In Commonwealth v. Davenport, 471 Pa. 278, 370 A.2d 301 (1977), our Supreme court held that any statement obtained from the defendant after arrest but before a preliminary arraignment is inadmissible if the defendant is not arraigned within six hours of arrest. Commonwealth v. Bond, 539 Pa. 299, 307-308, 652 A.2d 308, 312 (1995). However, if there is a delay in arraignment beyond the six hour requirement enunciated in Davenport, supra, a statement is not per se inadmissible unless there is a causal connection between the receipt of the statement from the defendant and the subsequent delay in the preliminary arraignment, which would contribute to the inherent coercive nature of a prolonged custodial interrogation. Commonwealth v. Duncan, 514 Pa. 395, 406, 525 A.2d 1177, 1182 (1987). Consequently, our Supreme Court shifted the focus from the time of the arraignment to when defendant's statement was obtained, either within or beyond the six hour period between the time of arrest and arraignment. Duncan, 525 A.2d at 1182; Commonwealth v. Washington, No. 0091 Capital Appeal docket, 1997 Pa. LEXIS 768 * 7 (Pa. April 18, 1997). Hence, any statement obtained within six hours of arrest, absent coercion or any illegality, does not violate the rights of the defendant. Duncan, 525 A.2d at 1182.

On January 4, 1996, at 3:50 p.m., defendant was read his Miranda rights before the defendant was questioned about his involvement with the criminal acts on January 2, 1996 (N.T. 10/1/96, pp. 55, 80). After defendant voluntarily waived these rights, defendant confessed to his role in the attempted robbery and shooting of Officer Vaird at the PNC Bank on January 2, 1996. (N.T. 10/1/96, pp. 55-73). The Philadelphia homicide detectives concluded their interview with defendant at 7:40 p.m. without further contact with the defendant (N.T. 10/1/96, pp. 73, 80-82). Although the defendant was not arraigned until the following day on January 5, 1996, there was no causal connection between the statement obtained from the defendant and the subsequent delay in his arraignment (N.T. 10/4/96, pp. 23-39, 76-78). See Duncan, 525 A.2d at 1183. Therefore, since there was no coercion or illegality surrounding defendant's statement and the statement was obtained within six hours of defendant's arrest, the statement obtained from defendant was not violative of defendant's rights.

e. Defendant states that his constitutional rights were violated by the police when the police permitted agents of the Federal Bureau of Investigation ("FBI") to interview him the next day.

During a custodial interrogation, the police cannot continue to question the defendant once the defendant has invoked his Miranda right to the presence of counsel, as guaranteed by the Fifth Amendment right against self-incrimination, and may not resume the interview without counsel present. Commonwealth v. Marinelli, __ Pa. __, 690 A.2d 203, 215 (1997) (citations omitted). The police also

cannot initiate a second custodial interrogation regarding other unrelated offenses without the presence of counsel because the invocation of the Fifth Amendment rightagainst self-incrimination is "non-specific". Marinelli, 690 A.2d at 215-216; Commonwealth v. Romine, __ Pa.Super. __, 682 A.2d 1296, 1299 (Pa.Super. Ct. 1996), allocatur denied, 1997 Pa. LEXIS 409 (Pa. February 24, 1997).

In the instant case, the FBI was investigating a number of bank robberies in the area and wanted to question defendant about an armed bank robbery that occurred on October 5, 1995 (Ex. D-A1 at 1-2; N.T. 10/1/96, pp. 81-85). Defendant never invoked his Miranda right to counsel during his first interview with the Philadelphia homicide detectives. Therefore, the subsequent FBI interrogation could not constitute a violation of defendant's Fifth Amendment right to counsel.

Nevertheless, after the Philadelphia homicide detectives concluded their interview with defendant, Special Agent Catherine M. Rafferty of the FBI conducted an interrogation of defendant, but only, after she again apprised defendant of his Miranda rights (Ex. D-A1 at 2). As with his first interview with the Philadelphia homicide detectives, defendant also waived these rights during his second interview with the FBI and provided the FBI with a statement regarding his role in this unrelated robbery (N.T. 10/1/96, pp. 105-107; Ex. D-A1 at 2-3). Consequently, defendant's claim that the law enforcement officials engaged in a carryover violation of his constitutional rights is without merit.

2. Defendant asserts that this Court improperly denied his motion for a severance for the reasons to follow.

The decision to grant a motion for severance is within

the discretion of the trial court and will not be reversed absent a manifest abuse of discretion. Commonwealth v. Presbury, 445 Pa.Super. 362, 366, 665 A.2d 825, 827 (Pa.Super. Ct. 1995), allocatur denied, __ Pa. __, 675 A.2d 1246 (1996). Generally, when the defendant has been charged with conspiracy, joint trials are preferred, but, if a defendant demonstrates that he or she will be prejudiced by a joint trial, severance may be apporpriate. Marinelli, 690 A.2d at 212-213. The trial court must balance the need to minimize the prejudice possibly caused by consolidation against the policy for judicial economy. Presbury, 665 A.2d at 828.

a. This Court allegedly improperly permitted the prosecution to use the statements of defendant and co-defendant Canty, which were obtained illegally from defendant on January 4, 1996.

This issue involves the voluntary nature of defendant's statement of January 4, 1996. This Court has thoroughly addressed this issue above.

b. Defendant claims that the joint trial with his co-defendant prejudiced him because there was no evidence except his confession to the police on January 4, 1996 to establish his involvement in the crimes committed on January 2, 1996.

Although defendant claims that there was no evidence linking him to the attempted robbery on January 2, 1996, the record belies this claim. First, the ATF traced the .9 millimeter automatic weapon found at the scene of the crime to the defendant. Specifically, the ATF traced the gun to

Richelle Parker, who stated to police that she purchased the .9 millimeter Bryco model 59 for defendant (N.T. 10/17/96, Afternoon Session, pp. 37-46, 85-92).

Secondly, on January 2, 1996, at approximately 8:30 a.m., James Guzzi nearly collided with a driver in a green minivan traveling in the opposite direction on Rising sun Avenue as Mr. Guzzi negotiated a left turn onto Front Street at the intersection of the 4700 block of Rising sun Avenue and Front Street (N.T. 10/16/96, pp. 147-150, 152-165). As a result of this near collision, the driver of the green minivan had to drive around Mr. Guzzi's Mack truck along the driver's side in order to free himself from the accident (N.T. 10/16/96, pp. 150-151, 163-166). Consequently, at a vantage point of six feet above the ground and a distance of 15 feet, Mr. Guzzi saw the driver's full face for approximately five seconds and the back of the passenger's head through the windshield of the minivan (N.T. 10/16/96, pp. 151-152, 160-162, 165-169, 173-174). Mr. Guzzi described the driver as a black male with a medium complexion and a round, heavy-set face with either short hair or wearing a cap and, subsequently, identified defendant as the driver (N.T. 10/16/96, pp. 150-151, 177). Mr. Guzzi later realized the significance of this accident when he saw a television news report about the police shooting at the Rising Sun Avenue PNC Bank with a picture of the same green minivan (N.T. 10/16/96, pp. 150-152, 177-178).

Finally, defendant's wife gave a statement to the police detailing defendant's meeting with his two co-defendants on the morning of January 2, 1996 (N.T. 10/18/96, pp. 167-202, 207-244). Defendant's wife recalled overhearing defendant and his co-defendants discuss ashooting on that day and their narrow escape from danger (N.T. 10/18/96, pp. 177-179, 215-217).

Based on the foregoing, there was substantial other

evidence in addition to defendant's confession to establish defendant's involvement in the attempted bank robbery on January 2, 1996. Therefore, defendant has failed to demonstrate prejudice on these grounds.

c. Defendant claims that his right of confrontation was violated by the admission of the redacted police statement of his co-defendant Mark Canty. Additionally, defendant states that this Court improperly permitted the prosecution to use his redacted statement as well as the redacted statement of co-defendant Canty at trial.

In order to remedy the problems created by the admission of a statement by a non-testifying co-defendant, the courts have approved the process of redaction, where pronouns or "other person" substitute specific names found in a co-defendant's confession. Commonwealth v. Brooks, 442 Pa.Super. 579, 588, 660 A.2d 609, 613 (Pa.Super. Ct. 1995), allocatur denied, __ Pa. __, 683 A.2d 876 (1996). Specifically, prior to the admission of a co-defendant's statement inculpating the defendant, the trial court must redact those portions of the co-defendant's statement referring to the defendant's guilt in order to avoid a violation of the defendant's right of confrontation. Commonwealth v. Ballard, 430 Pa.Super. 109, 115, 633 A.2d 641, 645 (Pa. Super. Ct. 1993). The trial court also must balance the potential prejudice to the defendant against the probative value of the evidence, the benefits to the judicial system by conducting a joint trial, and the possibility of minimizing prejudice to the defendant before admitting the co-defendant's statement. Commonwealth v. Wharton, 530 Pa. 127, 141, 607 A.2d 710, 717 (1992); Commonwealth v.

Oliver, 431 Pa.Super. 1, 7, 635 A.2d 1042, 1045 (Pa.Super. Ct. 1993). Moreover, a redacted statement of a co-defendant still may violate the defendant's right of confrontation as enunciated in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 476 (1968), if this statement is powerfully incriminating and provides substantial and critical weight to the prosecution's case. Brooks, 660 A.2d at 613.

Defendant claims that his constitutional right of confrontation was violated by the admission of the confession of his co-defendant Mark Canty. In a related claim, defendant also states that this Court never overcame "the weighty presumption" that the statement of co-defendant Mark Canty was "inherently unreliable". Prior to the admission of both the statements made by co-defendant Canty and defendant, this Court conducted two separate hearings on October 22 and 23, 1996 to determine the best method to redact these statements. The parties eventually reached an agreement as to the final redacted version of both statements, where portions of each statement inculpating either co-deendant were omitted and specific names substituted with "other person" or "person" when necessary to preserve the integrity of each statement (N.T. 10/22/96, Motion, pp. 71-92; N.T. 10/23/96, Motion, pp. 3-55, 78-80). The final versions of each statement only implicated the confessor of the statement and mentioned the confessor's role in the criminal acts on January 2, 1996 (N.T. 10/22/96, Motion, pp. 71-92; N.T. 10/23/96, Motion, pp. 77-80; N.T. 10/23/96, pp. 42-60, 106-118).

Furthermore, the redacted confession of co-defendant Canty was used to establish co-defendant Canty's involvement with the crimes charged, not defendant's role, as this Court repeatedly instructed the jury (N.T. 10/23/96, pp. 66-67; N.T. 10/30/96, pp. 17-21). See Wharton, 607 A.2d at

718-719. The defendant's statement, however, was used against defendant and was only one piece of a mosaic of evidence to establish defendant's role in the criminal acts of January 2, 1996. See Oliver, 635 A.2d at 1046. Therefore, no violation of defendant's confrontation rights occurred and defendant was not prejudiced by this Court's denial of his motion to sever his co-defendant's trial.

All allegations of error having been addressed by thhis Court and found to be without merit, defendant Warren McGlone stands properly convicted and sentenced by this Court.

BY THE COURT:

/s/ Glazer, J.
GLAZER, J.